

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

James Hardin, #275030)	
)	
Petitioner,)	
)	C.A. No.: 3:08-2334-PMD-JRM
v.)	
)	
Acting Warden, Leroy)	
Cartledge)	
)	
Respondent.)	
_____)	

ORDER

This matter is before the court upon Petitioner James Hardin’s (“Petitioner”) Objections to a United States Magistrate Judge’s Report and Recommendation (“R&R”) that the court deny Petitioner’s motion to dismiss his habeas petition without prejudice and deny his motions to amend his original habeas petition. A petitioner may object, in writing, to an R&R within ten days after being served with a copy of the report. 28 U.S.C. § 636 (b)(1). Petitioner filed a timely objection. Having reviewed the entire record, including Petitioner’s Objections, the court finds the Magistrate Judge fairly and accurately summarized the facts and applied the correct principles of law. Accordingly, the court adopts the R&R and fully incorporates it into this Order.

BACKGROUND

Petitioner is currently an inmate at the McCormick Correctional Institution in the South Carolina Department of Corrections serving concurrent sentences for two counts of armed robbery (30 years), two counts of kidnapping (10 years), and two counts of assault and battery of a high and aggravated nature (10 years). Petitioner timely appealed his convictions, and the South Carolina Court of Appeals affirmed Petitioner’s convictions and issued a Remittitur on

March 4, 2003. On September 25, 2003, Petitioner filed an application for post-conviction relief (“APCR”). The PCR court dismissed Petitioner’s claim with prejudice on June 28, 2006. Petitioner appealed to the South Carolina Supreme Court. On April 4, 2008, the South Carolina Supreme Court denied the petition for certiorari and issued the Remittitur on April 22, 2008.

On June 22, 2006, Petitioner filed a *pro se* habeas petition. Before the Court are three motions filed by Petitioner: (1) a December 15, 2008 motion “to allow the Petitioner to amend his habeas petition, to delete entire petition to represent proper grounds for relief and to move to dismiss without prejudice to exhaust state remedies;” (2) a December 15, 2008 motion “to dismiss his current petition for habeas corpus without prejudice (hold in abeyance) so that the Petitioner may present his amended claims to the appropriate state court for review;” and (3) a February 5, 2009 motion to amend his habeas petition to assert an additional claim based on “newly discovered evidence” regarding alibi witnesses.

The Magistrate Judge recommends denying Petitioner’s motions, and for the reasons set forth below, the court agrees.

STANDARD OF REVIEW

The Magistrate Judge made his review in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02. The Magistrate Judge only makes a recommendation to the court. It has no presumptive weight, and the responsibility for making a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). Parties are allowed to make a written objection to a Magistrate Judge’s report within ten days after being served a copy of the report. 28 U.S.C. § 636(b)(1). From the objections, the court reviews *de novo* those portions of the R&R that have been specifically objected to, and the court is allowed to accept, reject, or modify the

R&R in whole or in part. *Id.* Additionally, the court may recommit the matter to the Magistrate Judge with instructions. *Id.*

DISCUSSION

Petitioner essentially seeks to withdraw the grounds listed in his original habeas petition and replace those grounds with one new and unexhausted claim of newly discovered evidence. Petitioner claims that he has recently located several alibi witnesses who he was unable to locate for trial or for his PCR hearing. Petitioner has filed a second PCR action that is currently pending in the Court of Common Pleas of Spartanburg County. While the PCR action is pending, Petitioner requests that the court either dismiss his habeas petition without prejudice or stay Petitioner's habeas action until the PCR court decides Petitioner's alibi claim.

The Magistrate Judge recommends that Petitioner's motions be denied, and the court agrees. If the court granted Petitioner's motion to delete all existing grounds in his petition and amend the petition to include the alibi claim, then the habeas petition would consist of only one unexhausted claim, which the court must dismiss under 28 U.S.C. § 2254 (b)(1)(a). Petitioner asks the court to dismiss without prejudice; however, dismissal may result in Petitioner losing his right of federal review of all of his claims because of the one year statute of limitations imposed by 28 U.S.C. § 2244(d). *See Rhines v. Walker*, 544 U.S. 269, 274 (2005) (recognizing that "if the District Court in [the] case had dismissed the petition because it contained unexhausted claims, AEDPA's 1-year statute of limitations would have barred [petitioner] from returning to federal court after exhausting the previously unexhausted claims in state court"). In the alternative, Petitioner asks the court to stay the habeas action to allow Petitioner to exhaust his claims in state court pursuant to *Rhines*, 544 U.S. 269. Under *Rhines*, district courts have discretion to stay habeas proceedings in limited circumstances—where the record supports a

finding that “there was good cause for the petitioner’s failure to exhaust the claims first in state court.” *Id.* at 278. The Magistrate Judge found that there is nothing in the record to support a finding of good cause, and the court agrees.

Petitioner’s objection to the R&R seeks to clarify and reiterate the gist of Petitioner’s three motions. While the Court understands what Petitioner is seeking, for the reasons stated above, the court denies Petitioner’s motions.

CONCLUSION

For the foregoing reasons, the court agrees with the Magistrate Judge’s Report and Recommendation that Respondents’ Motions be **DENIED** and remands Petitioner’s case to the Magistrate for further proceedings.

AND IT IS SO ORDERED.



PATRICK MICHAEL DUFFY
United States District Judge

September 11, 2009
Charleston, SC